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Supreme Court, U.S.
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In the OFFICE OF THE CLERK
Supreme Court of the United States

DARRYL KING,

Petitioner,

v.

NEW YORK STATE DIVISION OF PAROLE, NEW YORK STATE BOARD OF PAROLE, ROBERT DENNISON,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a person granted complete termination of his parole and sentence have a constitutionally protected liberty interest in maintaining his complete freedom such that he is entitled to due process when State officials withdraw the termination?

2. Do *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972), and *Young v. Harper*, 520 U.S. 143, 117 S. Ct. 1148 (1997), govern the analysis of the liberty interest of a person granted the complete termination of his parole, as argued by Petitioner, or does *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293 (1995), as implicitly applied by the Second Circuit, govern?

3. Did the Second Circuit unconstitutionally deny Petitioner relief when it failed to apply *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007) (and other Supreme Court cases analyzing 28 U.S.C. Sec. 2254(d)), and it denied Petitioner's habeas petition because of "the total absence of authority on the due process rights of an individual in King's position," despite this Court's decisions in *Morrissey* and *Young*?

LIST OF PARTIES

Petitioner is Darryl King.

Respondents are the New York State Division of Parole, the New York State Board of Parole and Robert Dennison.

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The reported June 23, 2003 decision of the Appellate Division, Second Department, New York Supreme Court, *King v. New York State Division of Parole*, 306 A.D.2d 482, 761 N.Y.S.2d 515 (2d Dep't 2003), which reversed the grant of relief, is reproduced at 36a-37a.

The reported November 25, 2003 order of the Court of Appeals of the State of New York denying leave to appeal, *King v. New York State Division of Parole*, 807 N.E.2d 289 (N.Y. 2003) (Table), is reproduced at 35a.

The unreported March 21, 2005 decision of the United States District Court for the Eastern District of New York denying Petitioner habeas corpus relief is reproduced at 14a-34a.

The unreported January 16, 2008 decision of the United States Court of Appeals for the Second Circuit affirming the denial of habeas corpus relief is reproduced at 3a-13a.

The unreported May 8, 2008 order of the United States Court of Appeals for the Second Circuit denying Petitioner's request for rehearing en banc review of the January 16, 2008 decision is reproduced at 1a-2a.

STATEMENT OF JURISDICTION

The Second Circuit entered the decision that is the subject of this petition for certiorari on January 16, 2008, 3a-13a, and denied Petitioner's timely petition for rehearing en banc on May 8, 2008, 1a-2a. This timely petition is filed within 90 days of the order refusing en banc rehearing. *See* Sup. Ct. R. 13.3.

This Court has jurisdiction pursuant to 28 U.S.C. Sec. 2254(a).

STATUTORY PROVISIONS INVOLVED

Section 2254(d) of Title 28 of the United States Code provides, in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The Second Circuit (Straub, Wesley, Livingston, JJ.), held in a summary but precedential decision

that an individual whose parole and sentence were unconditionally terminated, and who was released from State custody to live without restrictions, but who approximately a month after the termination was told that the State had withdrawn the termination of parole, lacks any liberty interest entitling him to any due process. The Second Circuit should have determined that under *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972), and *Young v. Harper*, 520 U.S. 143, 117 S. Ct. 1148 (1997), Petitioner had a protected liberty interest entitling him to due process in which he could have challenged the illegality of the withdrawal and the pretextual nature of the explanations given for that withdrawal, and had the withdrawal reversed. The New York State appellate courts' failure to grant relief was accordingly unreasonable and contrary to established Supreme Court law.

Under *Morrissey* and *Young*, a person who has been released from incarceration to parole or pre-parole, even if his sentence has not expired, has due process rights under the Fourteenth Amendment if the State seeks to reinstate incarceration. In contravention of these cases, the Second Circuit denied that Petitioner had a liberty interest in his freedom. Rather than applying *Morrissey* and *Young*, the Second Circuit implicitly applied *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293 (1995), under which a prisoner's due process rights are measured by assessing whether the prisoner's status in confinement is "atypical and significant" in comparison to some baseline status. The Second Circuit's application of the *Sandin* standard (although it did not cite to *Sandin*) expanded the

application of that case beyond prison situations and required Petitioner, who was not incarcerated, to show that he faced an "atypical and significant" change in his status before the Court would recognize his liberty interest in his complete freedom. Specifically, in concluding that Petitioner lacked a liberty interest, the Court wrote: "[T]here is a significant difference between a parolee or pre-parolee losing such status–and, thus, facing reincarceration–and a recently and erroneously discharged parolee who must return to his status of only a few weeks before." 7a. But *Morrissey* and *Young* do not require--or even allow for--a comparative analysis of Petitioner's "before" and "after" status to identify a liberty interest; rather, a free person necessarily has a liberty interest in his freedom that is cognizable under the Constitution, and he is entitled to due process if the State seeks to take that freedom. The improper application of the *Sandin* standard to a non-incarceration case is an example of a split among the courts of appeals and within the Second Circuit as to *Sandin*'s proper scope, as discussed below.

The Second Circuit compounded its error by holding Petitioner to an impossible standard under 28 U.S.C. Sec. 2254(d), given that his circumstances were unusual. The Court stated that Petitioner

> has identified no decision by the Supreme Court, this Court, or any other federal court addressing a claim by a former parolee who had been mistakenly discharged from parole. [footnote omitted] Given the total absence of authority on the due process rights of an individual in [Petitioner]'s position, we cannot

> conclude that the Appellate Division's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" within the meaning of 28 U.S.C. Sec. 2254(d)(1).

7a-8a. This analysis contravened *Panetti v. Quarterman*, 127 S. Ct. 2842 (2007), which requires the unreasonableness of a state court's application of the law to the facts to be assessed in light of generally stated holdings of this Court but does not require that the exact same facts have been previously presented to this Court. *Id.* at 2855. While Petitioner's exact situation may be unusual, around the country many individuals with protectible liberty interests find themselves caught in the interstices of their constitutional rights and parole regulations and in need of due process protections. Given *Morrissey* and *Young*, which held that parolees and pre-parolees have liberty interests in their non-incarcerated status, it was logical to extend these cases to Petitioner's circumstances. *See Williams v. Taylor*, 529 U.S. 362, 408-09, 412, 120 S. Ct. 1495 (2000). Without the proper application of these cases, neither Petitioner nor others deprived of their liberty interests will be fairly heard.

Additionally, the appellate courts made two fundamental factual errors about Petitioner's case. First, in deciding that Petitioner had no liberty interest in the termination of his parole, they accepted without question the State's representations that the parole termination had been "mistakenly" or "erroneously" granted, 7a, which was precisely the issue that Petitioner would have challenged if he had ever received any due

process. The State's initial report proposing the parole termination was only first produced by the State in 2007, during the Second Circuit appeal, and was admitted to the record by the Circuit. 4a n.1. It shows that the two reasons that the State claimed as the basis for its withdrawal of Petitioner's termination of parole were not correct. Second, the appellate courts rejected out of hand, without any due process or discovery, the possibility that political considerations had influenced the withdrawal of the parole termination, despite the fact that Petitioner had long litigated with the State over his parole rights, New York Governor George Pataki was well known to oppose parole benefits for convicted "cop killers", and there is a pending lawsuit challenging the Pataki policies, *see Graziano v. Pataki*, 06-Civ.-480(CLB) (SDNY).

Accordingly, the Second Circuit's holding is directly contrary to, and irreconcilable with, this Court's decisions in *Morrissey*, *Young* and *Panetti*. Given the "obvious[ness]" of the Second Circuit's error, this Court should grant this petition for certiorari and summarily reverse. *See Gonzalez v. Thomas*, 126 S. Ct. 1613, 1614 (2006). Alternatively, and in view of the fact that the logic of the Second Circuit's decision has the potential as a practical result to foreclose habeas relief to all individuals whose exact factual situation has not been previously decided by this Court but whose liberty interest arising from the Constitution is established by their freedom from institutional incarceration, this Court should grant this petition and set the case for briefing and argument.

Petitioner was a free man the day his parole was terminated. The State's pretextually based, grossly unfair and unlawful decision to require him to submit to parole again without any due process should not go unrectified.

STATEMENT OF THE CASE

A. *History Of Petitioner's Incarceration & Withdrawal Of The Termination Of Parole*

1. *Petitioner's Incarceration And Parole Release*

In 1971, Petitioner Darryl King was convicted of felony murder for charges relating to the fatal shooting of an off-duty police officer during a robbery by two men on May 25, 1970, and sentenced to 25 years to life. *See King v. NYS Div. of Parole*, 598 N.Y.S.2d 245, 248, 190 A.D.2d 423 (1st Dep't 1993). In federal habeas proceedings, the Second Circuit Court of Appeals invalidated Petitioner's sentence. *See King v. Hoke*, 825 F.2d 720 (2d Cir. 1987). Although at trial the State had proceeded as if Petitioner had been the shooter, it conceded in the federal case that he had not fired the fatal shot. *See King*, 598 N.Y.S.2d at 247. A New York state court re-sentenced Petitioner to 20 years to life, making Petitioner eligible for parole on May 28, 1990. *Id.*

After Petitioner's parole requests were denied, he brought a proceeding in New York State court, which ruled for Petitioner and ordered that parole be granted. (Second Circuit Record) R.6-21, 239. The Appellate Division, First Department, affirmed but remanded for a *de novo* hearing before a different Parole Board panel. *See King*, 598 N.Y.S.2d at 521. The New York Court of Appeals affirmed, stating

that the Board "must provide the inmate with a proper hearing in which only the relevant guidelines are considered . . . . As the record before us indicates, that was not done here." *King v. NYS Div. of Parole*, 632 N.E.2d 1277, 1278 (N.Y. 1994).

After twenty-three years in prison, Petitioner was placed on work release in 1993 and granted parole release July 6, 1995. R.239. Following his release, he worked tirelessly on criminal justice, community development and offender rehabilitation issues. He lectured locally and around the country, and collaborated with community activists and government officials on community-justice projects. He received numerous honors. He is respected in his field of community reintegration of former convicts. He, his wife and family live in a home they own. R.249-53.

2. *Petitioner's Absolute Discharge From Parole*

In 1998, after serving three years of unrevoked parole, Petitioner became eligible for an absolute discharge under New York Executive Law § 259-j, which provided:

> If the board of parole is satisfied that an absolute discharge from . . . parole is in the best interests of society, the board may grant such a discharge prior to the expiration of the full term or maximum term to any person who has been on unrevoked parole for at least three consecutive years. *A discharge granted under this section shall constitute a termination of the sentence with respect to which it was granted.*

Id. (emphasis added).

On or about August 22, 2000, Petitioner's parole officers submitted a parole discharge report on his behalf. R.240; 4a n.1. A parole officer informed Petitioner that an updated mental status report was unnecessary. R.242.

The Division of Parole's initial August 2000 report supporting the application for parole termination was only produced in 2007 after Petitioner filed his appeal with the Second Circuit. The Second Circuit enlarged the record to include this initial report. 4a n.1. The "discharge summary" portion of the report states that "[t]his subject is eligible for discharge consideration," and that "[a] review of the subject's supervision history to date indicates that the subject is a suitable candidate for an early discharge." The first page of the form was signed on August 16, 2000 by a parole officer, and on August 18, 2000 by a senior parole officer and by Louis Cali as an area supervisor. Above Mr. Cali's signature is the following statement: "The signature below attests to the fact that there are no known contra-indications to the above recommendation(s) at the time this report was prepared." Below his signature is a notation indicating that the first page is one of four pages of the report. Contrary to the representations later made in the September 18, 2000 Division of Parole letter and the January 2, 2001 Cali memorandum, the initial report shows that the Board was actually advised of Petitioner's time on work release and parole. The report states on its second page that Petitioner had spent 2 (two) years on "intensive" supervision and 5 (five) years on

"regular" supervision. Its fourth page states: "Attached: Mental Status Report (If applicable)."

A memorandum dated August 25, 2000 from the Board to the Department of Corrections ("DOCS") reported that Petitioner and four other parolees had been granted an "absolute discharge" pursuant to Executive Law Section 259-j. It stated that "[t]his Board action constitutes a termination of the sentence(s) with respect to which it was granted. Please make the annotation in the D.O.C.S. records to reflect the satisfaction and termination of sentence for those individuals listed." R.22, 240. Petitioner was advised of the Board's decision.

3. *The Unlawful Withdrawal Of Petitioner's Absolute Discharge From Parole*

By letter dated September 18, 2000 and signed by Senior Parole Officer Flot, the Division of Parole informed Petitioner that it had "withdrawn" his discharge:

> it has been necessary for the Board of Parole to withdraw it's [sic] authorization for your early discharge and that you are to effectively continue to comply with the conditions governing your parole supervision.
>
> This decision was based upon the Board's finding errors and omissions in the discharge summary.
>
> By Division of Parole policy, it is necessary that a current Mental Status Report be completed and submitted to the Board.
>
> Please be advised that as soon as the mental status evaluation is completed, the report will

> be re-submitted to the Board for it's [sic] consideration.
>
> I recognize that this may be a readjustment for you and encourage you to continue positively with your parole supervision.

R.23, 241. The alleged "errors and omissions" were not then disclosed to Petitioner. R.241.

Petitioner's attorney inquired about the alleged "errors and omissions." On October 5, 2000, he was informed that they related to the dates of Petitioner's parole and work release, and to a mental status report, and that once a mental status report was submitted, the matter would return to the Board for the discharge to be republished. R.45-46, 241-242. On November 20, 2000, a Board-certified psychiatrist examined Petitioner and recommended parole termination in a mental status report. R.24, 242. Petitioner and his attorney were told that the parole and work release date errors had been corrected and that there was no other open issue except for the mental status examination, which had been updated. R.45, 243.

On January 2, 2001, Lou Cali, a Deputy Regional Director-Metro 2 for Parole, wrote to the Board:

> Please note that the final discharge on Darryl King had been granted effective 8/25/00. However, that action had to be withdrawn due to errors on the initial submission.
>
> > 1) The report had indicated the release date as 7/6/93, which credited 84 months of parole supervision. The calculation included time spent on work

> release, which should not have been included as parole time. The corrected report, now indicated a release date of 7/6/95* and 66 months of parole supervision.
>
> 2) The initial report failed to include a current Mental Status Evaluation, as required under the Division's Policy and Procedure Manual, item number 8340.00 and 9208.02. Please note that the Psychiatric Evaluation is now annexed.

R.31, 242. (Neither Petitioner nor his attorney learned of this memorandum until December 2001, when it was submitted in opposition to Petitioner's petition in the New York State court.)

4. *The Board's Subsequent Refusals To Reinstate Petitioner's Discharge / Parole Termination*

In June 2001, Petitioner's parole officers and their area supervisor submitted another discharge request on his behalf. The Board deferred consideration and directed the Brooklyn Parole Office to resubmit on January 2, 2003. R.32. A Board memorandum dated June 13, 2001 stated:

> Subject's discharge is denied due to the extremely violent nature of the instant offense, during the course of which a human life was taken (off duty NYC police officer). To release the subject from the supervision at this juncture would deprecate the seriousness of his criminal act. His positive adjustment is

> noted however a longer period of supervision is necessary.

R.32, 243. This memorandum was sent to Petitioner's attorney with a letter dated July 26, 2001. These circumstances painfully echoed the legal battle Petitioner had waged all the way to the New York Court of Appeals in order to compel the Board to adhere to the proper standards for his parole determination, and ultimately to secure parole despite his felony murder conviction involving the death of a police officer. *See* Section A(1), *supra*.

In March 2003, after Petitioner had received a favorable ruling on his Article 78 petition which ordered the Board to reconsider the withdrawal of his parole discharge, *see* Section B(1), *infra*, the Board again denied his discharge. R.54-61, 244. It deferred consideration until March 19, 2005, stating:

> Upon review of the file, the parolee's discharge is denied as it is not in the best interests of society. The extreme seriousness of the instant offense wherein an off duty police officer was shot to death militate against an absolute discharge. While the parolee has made a positive adjustment to supervision, discharge at this time would deprecate the seriousness of his crime as to undermine respect for the law. Accordingly, a longer period of supervision is warranted.

R.147, 247.

B. *Petitioner Exhausted His State Court Remedies*

1. *Petitioner Sought Relief From The New York Supreme Court*

On November 21, 2001, Petitioner commenced an Article 78 proceeding in the New York Supreme Court based on violations of Petitioner's federal and state constitutional rights and of New York statutes. R.33, 244. Petitioner claimed that the Board's unlawful actions violated, *inter alia*, his rights to be free from arbitrary government controls; to be free from irrational, arbitrary and capricious government actions, including those taken to advance a political agenda; and to receive due process. R.41. His petition stated that the State's "order of July 26, 2001 denying Petitioner's request for discharge from parole was illegal, unlawful, arbitrary, capricious, and a denial of due process of law under the Constitutions of the United States and of the State of New York, in that inter alia, Petitioner's discharge from parole was denied and rescinded in violation of due process of law." R.41, 48-49.

Petitioner cited cases recognizing a parolee's liberty interest, including *Morrissey v. Brewer*, 408 U.S. 471 (1972), and argued that he had a protected liberty interest in his freedom from parole. He also contended that the Board had acted against him for political reasons, and stated that "[t]hat course of events is arbitrary, capricious, irrational and grossly improper by definition, and cannot be allowed to stand." R.50.

2. *The Trial Court Granted Relief*

On May 24, 2002, the trial court granted relief:

> In the unique circumstances presented here, including the failure of the Board to apply the proper statutory guidelines in reaching its determination, and the past history of this case, it is apparent that respondents acted irrationally and their determination cannot be upheld.

45a. The Court stated that "[i]t is apparent that the respondents' June 2001 determination denying the reapplication of the local parole board to discharge the petitioner from parole had no connection to the two reasons advanced in January 2001." 46a. It continued:

> Since the Parole Board failed to apply the proper statutory standard, and denied discharge for reasons having nothing to do with the reasons advanced why the August 2000 discharge was "withdrawn," the Parole Board's determination is irrational, arbitrary and capricious and must be vacated. The arbitrary and capricious nature of the Board's determination is reinforced by the extensive history of these proceedings.

46a-47a. The Court vacated the determination and directed the Board to reconsider the reapplication for discharge within 30 days. 47a.

3. *New York's Intermediate Appellate Court Reversed The Grant Of Relief*

The State appealed. Petitioner opposed, arguing that "[t]his is a case, as the Court below recognized, of whether, once Petitioner's parole had been terminated through that process and due process

liberty interests in his release were thereby created, the Board could, for pretextual reasons, rescind the release and then justify its arbitrary decision by shifting from a procedurally based excuse for rescission to a different excuse for denial." R.93, 103-107. He argued that "[b]ecause Petitioner has a liberty interest in his discharge, he was entitled to due process protections. Once the discharge was granted, liberty interests were created, and they could not be withdrawn without due process protections and an evidentiary hearing, with representation by counsel." R.106, 108-109, 115.

On June 23, 2003, the Appellate Division reversed. 36a-37a. It stated that "the petition is denied, the determination is confirmed, and the proceeding is dismissed on the merits." 37a. The Court continued:

> The discretionary determination of the New York State Division of Parole to deny the petitioner a discharge from parole was made in accordance with the law and, therefore, is not subject to judicial review.

Id. (internal citations omitted).

4. *Petitioner Moved Unsuccessfully For Leave To Appeal To The New York State Court Of Appeals*

On July 31, 2003, Petitioner timely filed a motion for leave to appeal to the New York Court of Appeals, raising federal constitutional and state law claims. R.150-207. On November 25, 2003, the Court of Appeals denied leave to appeal. 35a.

C. *Petitioner's Federal Habeas Petition And/Or Request For Relief Under Section 1983 Was Denied*

On June 23, 2004, Petitioner filed a petition for habeas corpus relief or relief under 42 U.S.C. Sec. 1983. The grounds were constitutional due process, the right to equal protection under the law, and the right to freedom from unlawful seizure. R.230.

On March 21, 2005, the district court denied relief, repeating the errors made by the Appellate Division. 14a-34a. First, it did not acknowledge Petitioner's liberty interest, comparing him to an inmate seeking release from prison, rather than to a parolee already released, thus relying on the wrong line of constitutional cases. 29a-30a. It held that Petitioner could not establish that federal law required proof of a "quantum of evidence" before a parole-related benefit may be rescinded. 29a. This ignored Petitioner's fundamental objection that the question of the amount of evidence had never been reached because no evidence whatsoever had been taken in support of the withdrawal, as no hearing had been held.

Petitioner filed a notice of appeal and motion for a certificate of appealability, which was granted.

On January 16, 2008, the Second Circuit affirmed the denial of Petitioner's habeas petition. 3a-13a. The Court stated that Petitioner argued that "the Board's revocation of his discharge from parole in September 2000 violated his due process rights because he was allegedly deprived of a protectible liberty interest with no pre-deprivation hearing." 6a. The Court continued: "Due to the fact that the

Appellate Division of the New York Supreme Court considered and rejected this claim on the merits, we must decide whether that state court proceeding was 'contrary to' or an 'unreasonable application of clearly established federal law." *Id.* (citation omitted). The Court briefly reviewed *Morrissey* and *Young*, then reported:

> [b]ased upon these decisions identifying a 'liberty interest' in such circumstances, [King] argues that a parolee who has been informed of his discharge from parole surely must also have such a liberty interest. [Footnote omitted.] However, there is a significant difference between a parolee or preparolee losing such status–and, thus, facing reincarceration–and a recently and erroneously discharged parolee who must return to his status of only a few weeks before. Regardless, King has identified no decision by the Supreme Court, this Court, or any other federal court addressing a claim by a former parolee who had been mistakenly discharged from parole. Given the total absence of authority on the due process rights of an individual in King's position, we cannot conclude that the Appellate Division's decision was 'contrary to, or involved an unreasonable application of, clearly establish Federal law' within the meaning of 28 U.S.C. § 2254(d)(1).

7a-8a.

Despite its citation to *Morrissey* and *Young*, the Second Circuit's analysis of Petitioner's liberty interest applied an analysis derived from *Sandin v.*

Conner, 515 U.S. 472, 115 S. Ct. 2293 (1995), which was the completely wrong approach. It assessed the existence of Petitioner's liberty interest using a comparative analysis, stating that his loss was less than that of a parolee or pre-parolee who faced re-incarceration such that he did not have a liberty interest in the parole termination. 7a. The Court should have recognized that the "nature" of Petitioner's liberty interest, the complete enjoyment of freedom unfettered by any state restriction, is a right recognized and protected by due process, and it should not have conducted a comparative analysis. *See Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 24-25, 99 S. Ct. 2100, 2112-2113 (1979) (Marshall, J., dissent). The Court also erroneously accepted the State's argument that Petitioner had been "erroneously" discharged, 7a, although the State offered no evidence to support this view and the expanded record disproved it. 4a.

The Second Circuit rejected Petitioner's alternate argument that his due process rights were violated by the irrational, arbitrary, capricious nature of the Board's actions in revoking his discharge from parole and refusing to reinstate it later. 10a-11a. The Court held that it was not irrational, arbitrary or capricious for the Board to have withdrawn the termination of parole, and to have denied on subsequent reviews the reinstatement of the termination for reasons in conflict with the August 2000 grant. 12a. The Second Circuit made this conclusion despite the fact that there had been no meaningful change in Petitioner's status between August 2000 and June 2001, and through 2003,

except for Petitioner's additional years satisfactorily served on parole.

D. *Petitioner's Parole Supervision Continues*

Petitioner seeks to reinstate the August 2000 termination of his New York State parole supervision. R.253-254. As a parolee, he is subject to many restrictions. For example, he is required to meet with his parole officer once a month and share with him details of his public and private life. *Id.* He is periodically frisked, required to submit to urine tests, and required to get a letter of permission from his parole officer to travel outside of New York City. *Id.* Being subject to parole is not a *de minimis* burden, but rather an enormous burden on Petitioner.

Although Petitioner has met the requirements without incident, they limit his freedom and are a significant limitation on his free enjoyment of life and orderly pursuit of happiness. Petitioner reports:

> Because I have seen and experienced the unfettered discretion of the Board in making determinations, such as denying me parole and rescinding my discharge from parole, I am always in fear that I could walk into the parole office and never walk out. After the Board released me from parole and put me back on parole, I fear they have the power to come up with charges against me and put me back in prison. I have a great relationship with my parole officer and senior parole officer--[] they submitted my application for discharge--but I fear such directives could come from their superiors.

R.253. *See, e.g., Gall v. U.S.*, 128 U.S. 586, 595-96 (2007).

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision and that of the Appellate Division entirely misapplied the law of this Court and should be reversed. The writ should be granted for four reasons, each of which is explained below.

First, the Second Circuit's ruling directly conflicts with this Court's decisions in *Morrissey v. Brewer*, 408 U.S. 471, 92 S. Ct. 2593 (1972), and *Young v. Harper*, 520 U.S. 143, 117 S. Ct. 1148 (1997). In *Morrissey*, the Court held that a parolee is entitled to due process protections before parole is revoked. By logical extension, Petitioner, too, is entitled to due process because he enjoyed the freedoms available to a person whose sentence has been fully served or terminated.

Second, the Second Circuit's application of a *Sandin*-driven analysis to examine a former parolee's liberty interest is blatantly incorrect and an example of one of several cases in which courts have incorrectly used *Sandin* to analyze the liberty interest of individuals under sentence but free from incarceration, rather than *Morrissey* and *Young*, creating a split in the decisions of the courts of appeals.

Third, the Second Circuit incorrectly interpreted 28 U.S.C. Sec. 2254(d) to require Petitioner to demonstrate that this Court had previously decided a factually identical case. The correct interpretation of that statute is as articulated by this Court in

Williams and more recently, in *Panetti*, which does not require that a case be based on factually identical circumstances before a holding of this Court must be applied.

Fourth, the writ should be granted to protect due process. New York State should not be permitted to exercise control over Petitioner without lawful authority or justification. Petitioner has suffered repeated abuses of executive power; he deserves to have this Court determine that such abuses will not be tolerated in a society governed by the rule of law.

A. *The Decision Of The Second Circuit Directly Conflicts With This Court's Decisions In* Morrissey *And* Young

The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; those who seek to invoke its procedural protection must establish that one of these interests is at stake. A liberty interest may arise from the Constitution by reason of guarantees implicit in the word "liberty," *see, e.g., Vitek v. Jones*, 445 U.S. 480, 493-94 (1980), or from an expectation or interest created by state laws or policies, *see, e.g., Wolff v. McDonnell*, 418 U.S. 539, 556-58 (1974).

Morrissey v. Brewer, 408 U.S. 471, 480 (1972), considered the availability of due process for a parolee facing parole revocation and answered affirmatively that a parolee has a vested liberty interest in maintaining his increased freedom. The Court stated:

> Whether any procedural protections are due [in parole revocation] depends on the extent to

> which an individual will be condemned to suffer grievous loss. . . . The question is not merely the weight of the individual's interest, *but whether the nature of the interest* is one within the contemplation of the liberty or property language of the Fourteenth Amendment.
>
> * * *
>
> We turn to an examination of the nature of the interest of the parolee in his continued liberty. The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. * * * [Footnotes omitted.] The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.
>
> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. * * * By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Morrissey, 408 U.S. at 481-83, 92 S. Ct. at 2600-2601; *see Jago v. Van Curen*, 454 U.S. 14, 20 n.2 (1981); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972).

Under *Morrissey*, the question thus is not what state-created right does a parolee enjoy, as suggested below by the State, but what is the "nature" of the interest which Petitioner enjoyed. 408 U.S. at 481-83; *see Wilkinson v. Austin*, 545 U.S. 209, 221, 125 S. Ct. 2384, 2393 (2005). Petitioner had a liberty interest in his discharge because with discharge, he was completely free of the State's supervisory authority after almost thirty years in State custody. R.253-254.

Young v. Harper, 520 U.S. 143 (1997), confirmed that the liberty interests of those free of incarceration are subject to an assessment of the "nature" of their interests, not to an analysis based on the scope of the state rules that allegedly created their interests, or by way of comparison of their status with the status of others also subject to state sentences. In *Young*, the Court held that the liberty interest identified in, and the due process required by, *Morrissey* applied where a prisoner had been released on the prison's initiative onto "pre-parole", but the governor sought to revoke that status without any wrongdoing by the parolee. Oklahoma's pre-parole program conditionally released prisoners to parole, and the governor later reviewed the release decisions, either approving or revoking them. The parole board had recommended the petitioner for parole and released him to parole after he had then served 15 years of a life sentence. After the parolee spent five months outside the penitentiary, the governor denied approval of his parole. This Court held that *Morrissey* controlled, and that the petitioner was entitled to due process before being re-incarcerated. The Court rejected Oklahoma's

argument that parole and pre-parole were so different that a pre-parolee lacked a liberty interest. *Id.* at 149-51. *Young* applies here: a parolee has a liberty interest in his freedom from restraints, even if that freedom was granted on the State's initiative without the necessary approvals, and the State cannot revoke that freedom, if at all, without providing due process. Petitioner faced almost an identical situation; and should have received the same process, at least.

Under *Morrissey* and *Young*, Petitioner is entitled to meaningful procedural protections because he is akin to either a prisoner granted a parole release date but facing rescission or a parolee facing parole revocation, and not, as the federal and state appellate courts held, an inmate without a parole date hoping for, but without a right to, parole. At a minimum, Petitioner is entitled to a parole applicant's rights, which would include due process with a rational rather than arbitrary, capricious or irrational review of his claims. Once Petitioner was advised in writing by the Board that he had been discharged, he accepted the decision as permanent and enjoyed his new freedom. R.240-241. As a former parolee, he had a liberty interest in his freedom from restraints.

Once Petitioner's liberty interest is acknowledged, protections are necessary to insure that the right is not arbitrarily abrogated. The requirements of due process are "flexible and cal[l] for such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481. *Morrissey* provided for a revocation hearing for parolees facing the loss of parole, with several due

process protections, *id.* at 483-84, none of which Petitioner received. At a minimum, due process guarantees a decision that is not irrational, arbitrary or capricious because the Fourteenth Amendment protects individuals from unrestrained government violations of their rights. *See Roth*, 408 U.S. at 584.

Here, due process would have allowed Petitioner to challenge the grounds given for the withdrawal of his termination in 2000 and refusal to reinstate it in 2001, in line with the decision of the New York trial court. Instead, the Second Circuit decided, without any evidence offered by the State, that Petitioner had been "erroneously" or "mistakenly" released from parole. 7a. By answering the question of whether the termination had been proper or not before allowing Petitioner the opportunity to be heard and present evidence before a neutral factfinder, the Second Circuit upended the "due" aspect of process and made the process seem unnecessary.

Finally, the June 2001 and March 2003 Board decisions claimed pretextual reasons for the denial: the seriousness of the underlying offense and the victim's status as a police officer. The State's reliance on these factors indicated that its decisions were pre-determined because these facts were never going to change. R.54-61. This sort of decision-making was arbitrary, capricious, improper, unlawful, and irrational, and blatantly violated Petitioner's due process rights.

B. *The Writ Should Be Granted Because The Second Circuit And Other Circuits Are Divided As To When A* Sandin*-Based Analysis Should Be Employed, And When* Morrissey *And* Young *Are Controlling When Assessing The Existence Of A Liberty Interest For Non-incarcerated Individuals*

Respondents argued below that Petitioner had no liberty interest in his freedom because he faced rescission, in which discharge is granted in error, rather than revocation, in which a parolee's conduct leads to the end of the parole grant and returns the parolee to prison. This argument introduced the *Sandin*-driven error that permeates the Second Circuit's decision: that Petitioner's liberty interest arose from the State's exercise of its discretion to grant the termination of parole, leaving the State unrestricted in its authority to withdraw that grant because Petitioner's loss was no greater than that of an individual hoping for parole, and certainly not as great as the loss faced by a parolee facing revocation. 7a. To the contrary, Petitioner's liberty interest arose from his experience of liberty after the termination of his sentence; the State's authority to grant that freedom initially and a comparison of Petitioner's experience to that of other parolees are irrelevant to whether he had a liberty interest. *See Young*, 520 U.S. at 151.

The Second Circuit's implicit use of a *Sandin*-based analysis in its examination of Petitioner's rights was incorrect and an example of one of several cases in which courts have incorrectly analyzed the rights of individuals free from incarceration under *Sandin*, rather than under *Morrissey* and *Young*.

The Circuit's decision is symptomatic of a growing misinterpretation of these due process cases and a split among the circuits.

In *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293 (1995), this Court held that the due process liberty interests created by Hawai'i's prison regulations will be generally limited to freedom from restraint which, while not exceeding a sentence term in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on an inmate in relation to the ordinary incidents of prison life. The prisoner's discipline in segregated confinement did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction, and thus did not implicate a due process liberty interest. *Sandin*'s comparative analysis requiring a court to look for "atypical and significant" hardships is properly limited to either cases in which the petitioner is incarcerated or to those where the liberty interest in dispute arises from prison regulations, and should not be extended to those cases where the interest arises by its "nature" under the Constitution or where the individual is no longer incarcerated. *See McQuillion v. Duncan*, 306 F.3d 895, 903 (9th Cir. 2002). The Second Circuit assessed Petitioner's liberty interest by way of comparison with others' possible loss of freedom, thus imposing the *Sandin* test where *Morrissey* and *Young* should have been used.

This confusion in the proper standard for assessing the liberty interests of convicts who are no longer incarcerated has relevance for other, more common, factual situations where courts must assess

whether a non-incarcerated individual has a liberty interest arising from the Constitution. As discussed below, some courts have applied *Sandin* to claims relating to work release or other "pre-parole" programs while others have found it inapplicable to non-incarceration scenarios.

Some courts have found protectible liberty interests in work release, while others have not. In *Asquith v. Dep't of Corrections*, 186 F.3d 407, 411 (3d Cir. 1999), the Third Circuit performed a dual analysis and held that an inmate participating in a residential work release program was not entitled to the protections of *Young*, and under *Sandin* lacked a liberty interest under either the Constitution or state regulations. *See Maples v. Boyd*, 2004 WL 1792775, at *6 (E.D. Pa. 2004) (considering that a transfer from a residential treatment program to incarceration may be subject to analysis under *Sandin*, *Young* or *Morrissey*). In *Dominique v. Weld*, 73 F.3d 1156, 1161 (1st Cir. 1996), the First Circuit concluded that a prisoner on work release status was not entitled to a hearing prior to revocation of that status and re-incarceration because he had no state-created liberty interest under *Sandin*.

In *Paige v. Hudson*, 341 F.3d 642, 643 (7th Cir. 2003), the Seventh Circuit applied *Sandin* to the question of "whether being removed from a home-detention program into jail is a sufficiently large incremental reduction in freedom to be classified as a deprivation of liberty under the *Sandin* doctrine" such that due process was available. The Court concluded: "We think it is a sufficient reduction, while acknowledging that it is less than the reduction of liberty that comes about when someone

on parole or equivalent status is reincarcerated." *Id.* In *Domka v. Portage County, Wis.*, 523 F.3d 776, 781 (7th Cir. 2008), the Seventh Circuit "save[d] for another day the narrow question of whether a prisoner--as opposed to a probationer, parolee or pre-parolee--has a liberty interest in a home detention program" under *Sandin, Morrissey*, or *Young*.

The Ninth Circuit has been much less equivocal about *Sandin*'s limited scope. In *McQuillion v. Duncan*, 306 F.3d 895, 903 (9th Cir. 2002), the Ninth Circuit stated that "[i]t is clear from the Court's framing of the problem in *Sandin*, and from the fact that *Sandin* cited Allen with approval, *see id.*, that *Sandin*'s holding was limited to internal prison disciplinary regulations. Courts and commentators that have considered the question in the wake of *Sandin* have reached this conclusion." *Id.* (citations omitted). In *Biggs v. Terhune*, 334 F.3d 910, 914-15 (9th Cir. 2003), the Ninth Circuit stated that "*Sandin* dealt with internal prison disciplinary regulations, and does not affect the creation of liberty interests in parole . . . ." *Id.* (internal citations omitted).

This error also merits correction for the Second Circuit because its own cases conflict as to whether *Sandin* applies to non-incarceration claims. Its more recent work release decision cited its earlier cases of *Anderson I* and *Friedl* to hold that "[t]here is no question that *Anderson* had a liberty interest in continuing his participation in the temporary release program," although the cited cases use entirely different analyses. *See Anderson v. Recore*, 446 F.3d 324, 328 (2d Cir. 2006). In *Anderson v. Recore* ("*Anderson I*"), 317 F.3d 194, 201 (2d Cir. 2003), the

Court stated that "the lack of relevance *Sandin* has to work release and similar programs became even more apparent--albeit after the actions under review on this appeal--when the Supreme Court decided *Young*." In *Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999), the Second Circuit wrote that "[t]he work release program in which Kim participated, at least the final phase in which she lived at home and worked at a job, while regularly reporting to Parkside, is virtually indistinguishable from either traditional parole or the Oklahoma program considered in *Young*. While participating in this phase of the TRP, Kim enjoyed a liberty interest, the loss of which imposed a sufficiently 'serious hardship' to require compliance with at least minimal procedural due process." In *Friedl v. City of New York*, 210 F.3d 79, 84 (2d Cir. 2000), the Court held that "[p]risoners on work release have a liberty interest in continued participation in such programs," but supported its decision by saying that "[t]he Due Process Clause protects inmates against 'atypical and significant' deprivation of liberty, *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, [] including withdrawal of work release. Thus, prisoners are entitled to procedural due process before they are subjected to such a deprivation of liberty." To the extent the later cases moved toward limiting *Sandin*'s application, the present case returns the Second Circuit to an overly broad application of *Sandin*.

It would be appropriate for this Court to make clear when a *Sandin*-driven analysis applies in the non-incarceration context, if ever, and to confirm its

limits, including that it should not have been implicitly applied to Petitioner's case.

We note that the Appellate Division did not engage in as sophisticated an analysis of the liberty interest as did the Second Circuit and thus did not explicitly make this same error. Nonetheless, by comparing Petitioner to parolees anticipating parole, rather than individuals enjoying parole, it erroneously and unreasonably analyzed his due process rights as those of someone who anticipated but did not yet enjoy his liberty. 36a-37a. This effectively led to the same result as the Second Circuit's application of a *Sandin*-inspired analysis: it did not identify Petitioner's liberty interest.

C. *In Contravention Of Panetti, The Second Circuit Incorrectly Interpreted 28 U.S.C. Sec. 2254(d) To Require That Petitioner Demonstrate That This Court Had Decided A Factually Or Legally Identical Case*

Under the "contrary to" clause of 28 U.S.C. Sec. 2254(d), a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case. *See Williams v. Taylor*, 529 U.S. 362, 413, 120 S. Ct. 1495, 1523 (2000) (Connor, J.).

In *Panetti v. Quarterman*, 127 S. Ct. 2842, 2855 (2007), the Court explained the proper application of Section 2254 in greater detail. The petitioner claimed that the Eighth and Fourteenth Amendments of the Constitution, as elaborated by a prior Supreme Court case, entitled him to certain procedures not provided in the state court. This Court agreed that no deference was due the state court decision:

> That the standard is stated in general terms does not mean the application was reasonable. AEDPA does not "require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was established. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner. These principles guide a reviewing court that is faced, as we are here, with a record that cannot, under any reasonable interpretation of the controlling legal standard, support a certain legal ruling.
>
> Under AEDPA, a federal court may grant habeas relief, as relevant, only if the state court's "adjudication of [a] claim on the merits . . . resulted in a decision that . . . involved an unreasonable application" of the relevant law. When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set

> forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.

Id. at 2858-59 (internal citations & quotations omitted).

The Second Circuit failed to abide by this standard in denying relief to Petitioner:

> Regardless, King has identified no decision by the Supreme Court, this Court, or any other federal court addressing a claim by a former parolee who had been mistakenly discharged from parole. Given the total absence of authority on the due process rights of an individual in King's position, we cannot conclude that the Appellate Division's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1).

7a-8a (footnote omitted).

The Second Circuit reasoned that the Appellate Division's decision was not an "objectively unreasonable" application of federal law because the Supreme Court has not decided a rescission of discharge case. This analysis is incorrect. The "unreasonable application" prong of Section 2254(d)(1) requires the court to look to the holdings of the Supreme Court and apply them by close analogy to the facts presented. As noted above, in *Young*, the Supreme Court rejected the kind of excuses offered by the Board and held that the inmate on pre-parole release had a liberty interest in

his freedom. By analogy, Petitioner had a similar liberty interest.

Accordingly, the Second Circuit's analysis does not follow *Panetti*. It applied the wrong standard to the extent it drew on *Sandin*. To the extent it relied on *Morrissey* and *Young*, it was unreasonable to hold that those cases do not require the conclusion that Petitioner as a former parolee had a liberty interest in his parole termination. For the reasons explained above, it was unreasonable to deny Petitioner the process owed under the analogous circumstances addressed in *Morrissey* and *Young*.

The Appellate Division's decision was also contrary to clearly established federal law and an unreasonable application of such law because it relied on state court cases in which the appellants did not have a liberty interest and were not entitled to review, rather than federal cases like *Morrissey* in which the petitioner had a liberty interest and was entitled to due process. The cases cited by the Appellate Division mainly discussed petitioners who sought parole or release from prison. It was plainly contrary to clearly established law to treat Petitioner's constitutional issues as if they were merely discretionary parole release issues which ordinarily do not involve liberty interests. The Appellate Division's misclassification of Petitioner as an individual without a liberty interest and failure to accord him due process was unreasonable and contrary to federal law.

According to *Panetti*, the Appellate Division should have applied legally and factually analogous, though not identical, decisions of this Court to hold

that the decisions of the federal courts and New York appellate courts violated the Supreme Court's holdings.

D. *The Writ Should Be Granted In The Interest Of Due Process*

Petitioner had to litigate for years the right to be given fair consideration for parole, establishing the leading case in New York on parolees' rights in the parole determination process. He has been a model citizen during his incarceration and since he has been on parole. He has now been litigating the unlawful withdrawal of the termination of his parole for almost eight years. He was a free man for almost a month and his sentence had been terminated, yet New York State has continued unlawfully to exercise control over his life. The Second Circuit's decision stated that Petitioner had been "erroneously" granted the termination of his parole. 7a. This statement begs the very question that would have been determined at a due process hearing. It is Petitioner's view that, on the contrary, a due process hearing would show, not that his parole was "erroneously" terminated, but that the reasons given for its withdrawal were pretextual, that it was withdrawn for political expediency, and that the termination of his parole was properly granted and should be reinstated.

CONCLUSION

The Second Circuit's decision is both plainly wrong and, in real-world terms, quite significant. The Appellate Division was similarly wrong. This Court should grant the petition for certiorari and either summarily reverse or set the case for briefing and argument.

Dated: New York, New York
August 4, 2008

Respectfully submitted,
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On the brief:
Vera M. Scanlon

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Court House
40 Foley Square, New York, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of May two thousand and eight,

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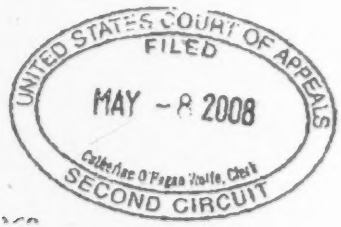
Darryl King,

Petitioner-Appellant,

v.

New York State Division of Parole, New York State Board of Parole, Robert Dennison,

Respondent-Appellees.



ORDER
No. 05-1860-pr

Darryl King having filed a petition for panel rehearing, or, in the alternative, for rehearing *en*

banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the court having considered the request for rehearing *en banc,*

IT IS HEREBY ORDERED that the petition is denied.

For the Court:
Catherine O'Hagan Wolfe, Clerk

By: _____
Frank Perez, Deputy Clerk

Myron Beldock Esq.
Beldock Levine & Hoffman LLP
99 Park Avenue
New York, NY 10016

King v. New York State Div. of Parole C.A.2 (N.Y.), 2008.
This case was not selected for publication in the Federal Reporter.
United States Court of Appeals, Second Circuit.

Darryl KING,
Petitioner-Appellant,

v.

NEW YORK STATE DIVISION OF PAROLE, New York State Board of Parole, & Robert Dennison,
Respondents-Appellees.

No. 05-1860-pr.

Jan. 16, 2008.

AFTER ARGUMENT AND UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Myron Beldock, Vera M. Scanlon, Beldock Levine & Hoffman LLP, New York, NY, for Petitioner-Appellant.

Lisa Fleischmann, Assistant Attorney General (Andrew M. Cuomo, Attorney General of the State of New York, Barbara D. Underwood, Solicitor General, Luke Martland, Assistant Attorney General, on the brief), New York, NY, for Respondents-Appellees.

PRESENT: Hon. CHESTER J. STRAUB, Hon. RICHARD C. WESLEY, Hon. DEBRA ANN LIVINGSTON, Circuit Judges.

SUMMARY ORDER

**1 Petitioner Darryl King appeals from the judgment of the United States District Court for the Eastern District of New York (Allyne R. Ross, *Judge*) denying his petition for a writ of habeas corpus pursuant of 28 U.S.C. § 2254. On appeal, King argues that the District court erred in concluding that the September 2000 decision by the New York State Board of Parole (the "Board") to revoke his erroneously granted discharge from supervised parole and its denials in June 2001 and March 2003 of his discharge requests did not violate King's rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[FN1] We presume the parties' familiarity with the underlying facts and procedural history of the case.

> FN1. On March 2, 2007, King submitted a motion to expand the record to include documents previously requested from, but not provided by, Respondents-Appellees. We grant King's motion and have considered the documents in question.

We review a district court's denial of a petition for a writ of habeas corpus *de novo*. *Eze v. Senkowski*, 321 F.3d 110, 120 (2d Cir. 2003). If a state court has already adjudicated a claim on the merits, we may

not grant the writ unless the state court proceedings either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or,
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(D). A state court decision is "contrary to ... clearly established Federal law" if the state court reached a "conclusion opposite to that reached by [the Supreme] Court on a question of law," or if the state court "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that precedent. *Williams v. Taylor*, 529 U.S. 362, 405, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). A state court decision constitutes an "unreasonable application" of such precedent when the state court "identifies the correct governing legal rule" but "unreasonably applies it to the facts" of the case, "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407, 120 S.C.t. 1495. To be an "unreasonable application" of clearly established federal law, the state court decision must be "objectively unreasonable" and not merely "incorrect

or erroneous." *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

In his petition, King does not argue that the Appellate Division reached any unreasonable factual determinations in his case. Instead, King argues that the Appellate Division failed to apply existing law governing his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. With regard to his Due Process claim, King advances two theories of relief. The first is that the Board's revocation of his discharge from parole in September 2000 violated his due process rights because he was allegedly deprived of a protectible liberty interest with no pre-deprivation hearing. Due to the fact that the Appellate Division of the New York Supreme Court considered and rejected this claim on the merits, we must decide whether that state court proceeding was "contrary to" or an "unreasonable application of" clearly established federal law. 28 U.S.C. § 2254(d)(1).

**2 The Supreme Court has instructed that whether a purported right is protected by the Due Process Clause of the Fourteenth Amendment depends on the "nature of the interest at stake." *Bd. of Regents v. Roth,* 408 U.S. 564, 571, 92 S.Ct. 2701, 33 L.Ed.22d 548 (1972). Specially, in order to consider a right protectible; "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* at 577, 92 S.Ct. 2701. In arguing that he had

such an entitlement to his discharge from parole once it had been given, erroneously or not, King relies primarily upon two Supreme Court decisions. In *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), the Court held that a parolee must be given a hearing prior to having his parole status revoked and being incarcerated again. Similarly, in *Young v. Harper*, 520 U.S. 143, 117 S.Ct. 1148, 137 L.Ed.2d 270 (1997), the Court extended the holding of *Morrissey* to revocations of "preparole"-a temporary status conferred on certain Oklahoma inmates by which the state parole board would release the inmate and subject him to normal parole conditions and supervision. *Id.* at 145, 149-53, 117 S.Ct. 1148. The Oklahoma governor would eventually decide whether the preparolee deserved full parole status; if not, the preparolee would be returned to incarceration. *Id.* (holding that a preparolee deserved a pre-deprivation hearing).

Based upon these decisions identifying a "liberty interest" in such circumstances, King argues that a parolee who has been informed of his discharge from parole surely must also have such a liberty interest.[FN2] However, there is a significant difference between a parolee or preparolee losing such status - and, thus, facing reincarceration-and a recently and erroneously discharged parolee who must return to his status of only a few weeks before. Regardless, King has identified no decision by the Supreme Court, this Court, or any other federal court addressing a claim by a former parolee who had been mistakenly discharged from parole.[FN3] Given the total absence of authority on the due

process rights of an individual in King's position, we cannot conclude that the Appellate Division's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1).

FN2. In a similar vein, King argues that regulations governing Board decision to rescind an individual's parole status "should have at least guided" the Board in its decision to revoke his discharge from parole. In advancing this argument, King cites decisions by the New York courts interpreting such regulations and considering the process due to a parolee whose parole status may be rescinded. However, King fails to identify any regulation specifically addressing the revocation of a parolee's erroneous discharge from parole. Indeed, the only apparently applicable regulation simply provides that "[i]n its discretion, the [B]oard may revoke or modify any of its decision or determinations." 9 N.Y.C.R.R. § 8000.4. Lacking any basis that the Board violated its own regulations in his case, King's argument here is largely the same as his argument that a parolee who has been erroneously discharged has the same due process rights as a parolee or preparolee whose status may be rescinded.

FN3. King also relies upon *Earley v. Murray*, 451 F.3d 71 (2d Cir.2006), where we held that a state agency may not administratively alter

> a sentence imposed by a state court without violating the Due Process Clause. *Id.* at 75-76. However, such a situation is distinguishable from the instant case, where an agency erroneously provides discretionary relief from a proper sentence, recognized its error, and reverses its decision.

King's second due process argument is that the Board violated his due process rights when it revoked his discharge status in September 2000 and denied his discharge request in June 2001 and March 2003; King argues that these decisions were "irrational, arbitrary or capricious." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004). King presented this claim to the Appellate Division and it was rejected on its merits. Therefore, we review the decision of the Appellate Division to determine whether it was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). With regard to the September 2000 revocation, King disputes the legitimacy of the two rationales provided by the Board: (1) the absence of a mental status report in his file, and (2) a miscalculation by the Board of the number of months King had spent on supervised parole or work-release. Irrespective of the number of months King had been a supervised parolee, he offers no persuasive argument why it was "irrational, arbitrary or capricious" for the board to revoke his discharge while completed and submitted a mental status report. On this point, King only cites his own affidavit as evidence that an unidentified parole officer had informed King that

such a report was necessary. Such a paucity of evidence is insufficient to demonstrate that the Board's decision was "irrational, arbitrary or capricious."

**3 As to the subsequent denials of his discharge requests King argues that the Board provided "improper reasons" for these decisions that were "entirely different" from those used to justify the revocation of his discharge. However, the relevant statute provided the Board with broad authority to grant a discharge from parole if the Board was "satisfied" that such action would be "in the best interests of society." N.Y. Exec. Law § 259-j(4). The Board based its June 2001 denial of King's request for a discharge upon the "extremely violent nature of the instant offense, during the course of which a human life was taken (off duty NYC police officer)." In March 2003, the Board denied King's request on the ground that his discharge "is not in the best interests of society: due to the "extreme seriousness of the instant offense wherein an off duty police officer was shot to death." At that time, the Board recognized that King "has made a positive adjustment to supervision," but it stated that granting his "discharge would deprecate the seriousness of his crime as to undermine respect for the law." King characterizes these rationales as "old facts [that] will never change, no matter how long Mr. King stays on parole as a model parolee." In addition, King speculates that another motivation behind the denials of his discharge requests was the "anti-parole policy" of the New York governor. In advancing these arguments, King essentially

questions the fairness of the New York parole statute for parolees, like himself, who have been convicted of violent crimes and speculates that political considerations affect the Board's decision-making. King also argues that the Board's expressed rationale for denying his discharge request cannot be the true motivation because it differs from the reasons provided by the Board ten months earlier in rescinding his discharge from parole on the ground that it was erroneously given. However, it should not be surprising that the Board would articulate different rationales for different agency decisions in different contexts, and King has identified no statutory or regulatory requirement that the Board must always apply the identical justifications to all of its decisions regarding the same parolee. As with his challenge to the September 2000 revocation of his discharge from parole, King cannot rely upon mere speculation and conjecture in arguing that the subsequent denials of his discharge requests were "irrational, arbitrary or capricious."

King's Equal Protection claim does not require lengthy analysis.[FN4] In asserting a claim based upon the Equal Protection Clause, King relies upon the "class of one" theory articulated in *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). In the decision, the Supreme Court recognized the viability of an Equal Protection claim "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564, 120 S.Ct. 1073. We have subsequently held that

"the level of similarity between [such] plaintiffs and the persons with whom they compare themselves must be extremely high." *Neilson v. D'Angellis,* 49 F.3d 100, 104 (2d Cir. 2005). Here, as the District Court observed, King has failed to identify a single individual with whom he can be compared Equal Protection purposes. As a result, this claim is wholly deficient, and the District court did not err in denying King's petition on this ground.[FN5]

> FN4. We agree with the District Court that King's Equal Protection claim is unexhausted because he did not raise it before the Appellate Division. However, like the District Court, we reach the merits of King's clam. 28 U.S.C. § 2254(b)(2).
>
> FN5. King attempts to redeem his Equal Protection claim by arguing that the District Court erred in denying his request for discovery on this claim. However, the District Court did not exceed its allowable discretion in its regard because King's request appears overly broad and vague. As such, King failed to demonstrate "good cause" for the discovery. *See* Rules Governing Secition 2254 Cases, Rule 6(a), 28 U.S.C.A. § 2254. Therefore, the District Court properly denied his request.

**4 In sum, we have considered all arguments presented by King in this appeal and find them to be without merit. For the foregoing reasons, we GRANT King's motion to expand the record and AFFIRM the judgment of the District Court.

C.A.2 (N.Y.),2008
King v. New York State Div. of Parole
260 Fed.Appx. 375, 2008 WL 145504 (C.A.2 (N.Y.))

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DARRYL KING,

Petitioner,

-against-

NEW YORK STATE DIVISION OF PAROLE, et al.,

Respondent.

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04 CV 2592 (ARR)

NOT FOR
PUBLICATION

OPINION AND ORDER

ROSS, United States District Judge:

Petitioner Darryl King ("King" or "petitioner") filed the instant petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on June 23, 2004. Petitioner challenges the state Parole Board's rescission of his discharge from parole and its subsequent denial of discharge. Petitioner claims that respondent's actions: (1) violated his liberty interest in the discharge that arose when it was originally granted; (2) were irrational, arbitrary and capricious, in violation of his due process rights; (3) deprived him of his right to equal protection under the Fourteenth Amendment; and (4) were illegitimate and outside the scope of the Parole Board's authority. For the reasons stated below, the court denies the petition for a writ of habeas corpus.

BACKGROUND

Petitioner's case has a long and serpentine procedural history. Petitioner was originally convicted on May 24, 1971 in Supreme Court, Kings County, of murder, second degree manslaughter, attempted robbery in the first degree, attempted grand larceny in the third degree, two counts of assault in the first degree, and a weapons possession charge. The charges arose out of the shooting death of an off-duty police officer during the robbery of a fast food restaurant by two men on May 25, 1970. Petitioner was the only person arrested and tried for the crime. Petitioner's conviction was affirmed on appeal to the Appellate Division, *People v. King*, 42 A.D.2d 587 (2d Dep't 1973), and the Supreme Court of the United States ultimately denied certiorari. *King v. New York*, 419 U.S. 858 (1974). Petitioner thereafter sought to collaterally attack his conviction through at least two section 440 motions, neither of which was successful. *People v. King*, 79 A.D.2d 992 (2d Dep't 1981), *leave to appeal denied*, 53 N.Y.2d 709 (1981).

Under then-applicable New York law, a hearing was held on April 23, 1971 to determine whether the jury would impose the death penalty or life imprisonment. If the jury did not impose the death penalty, petitioner would be sentenced to life imprisonment and the judge would determine, within statutory limits, a minimum period of imprisonment (MPI) after which the petitioner would be eligible for parole. *See King v. Hoke*, 825 F.2d 720, 721 (2d Cir. 1987). After the sentencing

judge explained to the jury the law that would guide his determination of the MPI, the jury voted for life imprisonment. On habeas review, the Second Circuit determined that the sentencing judge had an incorrect view of the applicable parole law and directed the federal district court to conditionally vacate King's sentence unless the state arranged for resentencing within ninety days. *Id.* at 724-25. Petitioner was thereafter resentenced to a term of imprisonment of twenty years to life, making him first eligible for parole release on May 28, 1990. *King v. New York State Div. of Parole*, 190 A.D.2d 423, 425 (1st Dep't 1993).

Petitioner's first appearance before the Parole Board resulted in a denial of his application, a determination that was subsequently vacated on the basis that a commissioner had served improperly on both the original panel and the appellate panel. *Id.* Petitioner was granted a new hearing, which took place in October 1991, and his application was again denied. His next appearance before the Parole Board occurred only four months later, on February 14, 1992. The board denied petitioner's application. Petitioner then commenced an Article 78 proceeding challenging the board's determination. By order entered January 12, 1993, the Supreme Court, New York County granted the petition, annulled the board's determination, and ordered that petitioner be released to parole supervision. 190 A.D.2d 423. On appeal, the Appellate Division determined that the Board had failed to give fair consideration to the statutory factors governing parole decisions. The court reversed the Supreme Court's order requiring

respondent to release petitioner to parole supervision, however, remanding the matter for a de novo hearing before a new panel of the Parole Board. *Id.* at 435. The Court of Appeals affirmed the Appellate Division's ruling by order dated June 3, 1993, finding that petitioner had not been afforded a proper hearing because one of the commissioners had considered factors outside the scope of the applicable statute. *King v. New York State Division of Parole*, 83 N.Y.2d 788 (1994).

Of greatest relevance to the instant petition is a decision of the Parole Board dated June 7, 2001 denying petitioner a discharge from parole. Petitioner had been released to parole supervision on July 6, 1995. The Parole Board thereafter granted petitioner an absolute discharge from parole on August 25, 2000, but rescinded that determination one month later on September 18, 2000. The Board denied petitioner's request for an absolute discharge on June 7, 2001. Petitioner later learned, through a letter dated January 2, 2001, that the Board had rescinded his discharge because the report on which the discharge was based (1) indicated 84 months of parole supervision rather than the actual 66 months of parole supervision and 18 months of work release, and (2) failed to include a current mental status evaluation. Respondent's Exhibit E. Petitioner also learned that the Board had denied his discharge request on June 7, 2001, after his discharge had been rescinded, on the basis of "the extremely violent nature" of his offense and because "to release the subject from supervision at this juncture would

depreciate the seriousness of his criminal act." Respondent's Ex. F.

Petitioner commenced an Article 78 proceeding to review the Board's determination. By order dated May 24, 2002, the Supreme Court, Kings County, vacated the determination and directed the New York State Division of Parole to reconsider petitioner's application for discharge. On appeal, the Appellate Division reversed the lower court's order, confirmed the Board's determination, and dismissed the proceeding on the merits. *King v. New York State Div. of Parole*, 306 A.D.2d 482 (2d Dep't 2003). The court found that "[t]he discretionary determination of the New York State Division of Parole to deny the petitioner a discharge from parole was made accordance with the law and, therefore, is not subject to judicial review." *Id.* (citations omitted). The Court of Appeals denied leave to appeal by order dated November 25, 2003. *King v. New York State Div. of Parole*, 1 N.Y.3d 502 (2003). Petitioner filed the instant petition for a writ of habeas corpus on June 23, 2004, within the one year statute of limitations.

DISCUSSION

I. AEDPA Standard of Review

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), enacted in 1996, established a deferential standard that federal habeas courts must apply when reviewing state court convictions. 28 U.S.C. § 2254(d). The statute provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"[C]learly established Federal law, as determined by the Supreme Court of the United States" "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court decision is "contrary to" clearly established Supreme Court precedent if "the state court applies a rule that contradicts" Supreme Court precedent or if "the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Supreme Court and nevertheless arrives at a result different from that precedent." *Id.* at 405-06. With respect to the "unreasonable application" clause, "a federal habeas court...should ask whether the state court's application of clearly established federal law was objectively reasonable." *Id.* at 409. In determining

whether an application was objectively unreasonable, "the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 410. Interpreting *Williams*, the Second Circuit has added that although "[s]ome increment of incorrectness beyond error is required . . . the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Frances S. v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) (internal quotation marks and citations omitted). This deferential standard applies whenever the state court has adjudicated the federal claim on the merits, even if it did not explicitly refer to the federal claim or discuss the reasoning for its decision, as long as the decision finally resolved a party's claims and was based on the substance of the claim advanced, rather than on a procedural ground. *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001).

II. Exhaustion

In the past, a state prisoner's federal habeas petition had to be dismissed if the prisoner did not exhaust available state remedies as to any of his federal claims. *See Rose v. Lundy*, 455 U.S. 509,522 (1989). "This exhaustion requirement is . . . grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The exhaustion requirement requires the petitioner to have presented to the state

court "both the factual and legal premises of the claim he asserts in federal court." *Dave v. Attorney General*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc). Pursuant to AEDPA, a district court may now, in its discretion, deny on the merits habeas petitions containing unexhausted claims – so called "mixed petitions." See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.").

Exhaustion of a federal constitutional claim in state court does not invariably require citation of "book and verse on the federal constitution." *Picard v. Connor*, 404 U.S. 270, 278 (1982) (internal quotations omitted). A claim may be presented for habeas review even if the federal grounds were not explicitly asserted before the state courts if the petitioner, in asserting his claim before the state court, relied on pertinent federal cases employing constitutional analysis, relied on state cases employing constitutional analysis in like fact situations, asserted his claims in terms so particular as to call to mind specific rights protected by the constitution, or alleged a pattern of facts well within mainstream of constitutional litigation. *See Dave*, 696 F.2d at 186.

III. Equal Protection

Petitioner raises an equal protection claim for the first time in his habeas petition, having failed to assert such a claim in state court. Petitioner invokes

the "class of one" equal protection theory established by the Supreme Court's holding in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Specifically, petitioner claims that the Parole Board violated his equal protection rights when it rescinded his discharge from parole, purportedly on the basis of political pressure from the governor that violent offenders not be discharged from parole and in order to retaliate against him for his previous challenges to the Board's rulings. Because petitioner never raised an equal protection claim in state court, the claim is unexhausted. Respondent concedes that the claim concerns off-the-record matters and that petitioner could still raise the claim in state court in a section 440 motion. The court may, however, deny an unexhausted claim on the merits. 28 U.S.C. § 2254(b)(2); *Aparacio v. Artuz*, 269 F.3d 78, 90 n.5 (2d Cir. 2001).

The Second Circuit has determined that to succeed on a "class of one" equal protection theory, a claimant must establish: (1) that he or she has been treated differently from others similarly situated; (2) that the conduct was irrational and wholly arbitrary; and (3) that there existed intentional disparate treatment. *Renis v. Thomas*, No. 02 Civ. 9256 (ABRLE), 2003 WL 22358799, at *5 (S.D.N.Y. Oct. 16, 2003) (internal quotations and citations omitted). As a preliminary matter, the court notes that petitioner has alleged disparate treatment from others similarly situated without identifying anyone in particular or otherwise specifying the nature of the disparate treatment. In fact, petitioner seems to request discovery of statistics and other information

relating to respondent's parole discharge determinations. Petitioner's Reply Brief at 27 n.7. Habeas petitioners, however, are not usually entitled to discovery. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rule 6(a) of the Rules Governing § 2254 Cases provides that a habeas petitioner is entitled to discovery "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Generalized statements regarding the possibility of the existence of discoverable material cannot yield "good cause." *Renis*, 2003 WL 22358799, at *1 (citation omitted). In the absence of specific evidence that the requested discovery would support the instant habeas petition, the court will not grant such discovery. The court is not convinced that petitioner has satisfied, or indeed can satisfy, the requirement that he has been treated differently from similarly situated parties. The court finds petitioner's claim of disparate treatment infirm for the same reason that it finds dubious petitioner's claims about respondent's intent. The nature of petitioner's claim undermines any possible contention that he received treatment that was intentionally different from the treatment others received. Throughout his papers, petitioner emphasizes that the Board has succumbed to political pressure by denying "parole-related benefits" to violent offenders. Petitioner's Reply Brief at 27. It follows that when violent offenders have been discharged from parole, the Board's decision in those cases must have been unintentional. It also follows that petitioner has not sufficiently established disparate treatment. Finally, petitioner has not established that the Board's

decision was "irrational" and "arbitrary." District courts in this circuit have held on numerous occasions that the Parole Board had a rational basis to deny parole to violent offenders when it stated that to do otherwise would "depreciate the seriousness of the crime." *See, e.g., Morel v. Thomas*, No. 02 Civ. 9622 (HB), 2003 WL 21488017, at *5 (S.D.N.Y. June 26, 2003). Thus, petitioner cannot show that the Board's determination was irrational or wholly arbitrary. Habeas relief is not warranted on this claim.

IV. Due Process

While King's petition and his brief are not a model of clarity, they seem to state two due process claims. First, petitioner argues that, once the discharge from parole was granted, a liberty interest was created that entitled him to a pre-deprivation hearing. Second, petitioner claims that his due process rights were violated because respondent's action was: (1) taken without evidence; (2) irrational; and (3) arbitrary, and capricious. The court will address these two due process claims in reverse order.

A. Irrational, Arbitrary, and Capricious Claim

The court notes preliminarily that petitioner's umbrella due process claim, asserting that the Parole Board's refusal to grant him a discharge after having rescinded an original discharge was irrational, arbitrary and capricious, and that the rescission lacked evidentiary basis, bears the

hallmark of a claim properly brought in a state court Article 78 proceeding. N.Y. C.P.L.R. § 7803. With respect to petitioner's claim that the Board's actions were irrational, arbitrary, and capricious, petitioner did not explicitly invoke federal law or cite a single federal case when he raised that claim before the Appellate Division. Moreover, only one of the four New York state cases cited in his brief to the Appellate Division in support of the argument even cited a federal case or employed federal constitutional analysis, and the constitutional analysis in that case did not address the "irrational, arbitrary, and capricious" claim. Thus, rather than asserting his claim before the state court in terms so particular as to call to mind specific rights protected by the constitution, petitioner asserted this claim in the state court specifically in the idiom of Article 78 proceedings. Even in his brief to this court on federal habeas review, petitioner has relied on state court decisions engaging in Article 78 review of parole determinations. The court would be hard-pressed to find that petitioner has presented a federal constitutional claim that respondent's actions were irrational, arbitrary, and capricious either to the highest state court or in his habeas petition. As a result, petitioner's claim would thus be unexhausted and, in any event, not cognizable on federal habeas review.

In fact, petitioner seems unaware of any federal habeas court having reviewed a state parole determination under an "irrational, arbitrary, or capricious" standard. That several district courts in this circuit have done so recently does not transform

petitioner's Article 78 claim into an exhausted federal claim that this court may consider on habeas review. The court will consider those cases nonetheless, out of an abundance of caution, to determine their applicability to petitioner's claim. Several district courts have recognized that, because the New York parole system does not create in any prisoner a legitimate expectancy of release, citing *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001), petitioner's federally-protected liberty interest is limited to not being denied parole for arbitrary and capricious or impermissible reasons. *Brown v. Thomas*, No. 02 Civ. 9257 (GEL), 2003 WL 941940, *1 (S.D.N.Y. March 10, 2003); *Boddie v. New York State Division of Parole*, 288 F. Supp. 2d 431, 440 (S.D.N.Y. 2003); *Manley v. Thomas*, 255 F. Supp. 2d 263, 266 (S.D.N.Y. 2003); *Morel v. Thomas*, No. 02 Civ. 9622 (HB), 2003 WL 21488017, at *3 (S.D.N.Y. June 26, 2003). Thus, insofar as federal habeas courts review New York state parole determinations to consider whether they were irrational, arbitrary, or capricious, the court finds that the standard is applicable only to the extent that petitioner has no liberty interest in the parole benefit. Significantly, courts considering this analysis have consistently held that the Parole Board is entitled to determine that the nature of the crime outweighs any positive aspects of a petitioner's record and to deny the benefit on that basis. *Brown*, 2003 WL 941940, at *2; *Morel*, 2003 WL 21488017, at *4-5.

In the instant case, petitioner apparently argues that the Board's June 7, 2001 decision to deny him a discharge from parole on the basis that

he was a violent offender and that release from supervision would "depreciate the seriousness of his criminal act" was irrational, arbitrary, and capricious in light of the fact that it had previously discharged him from parole, presumably determining that such discharge was "in the best interest of the community" as required by New York regulations before a parolee may be discharged. N.Y. Exec. L. § 259-j. Petitioner argues, in particular, that the Board's decision was arbitrary and capricious in that it was driven by political considerations and pressure from the governor that violent offenders not be discharged from parole. Even if the court were to find that petitioner presented this claim as a federal constitutional claim to the state courts, which he has not, or that he has presented such a claim in his petition, which is less than abundantly clear, the court is not inclined to find that the Board's decision was irrational, arbitrary, or capricious. Even if the court found sympathetic petitioner's claim that the Board's stated reasons for the rescission were pretextual, the court could not conclude that the Board's subsequent June 7, 2001 decision to deny a violent offender a discharge from parole was irrational, arbitrary, or capricious. In any event, given that the Appellate Division explicitly dismissed the claim on the merits, 306 A.D.2d 482, the court has no basis on which it may find that the state court's decision was contrary to or involved an unreasonable application of clearly established federal law. Petitioner has failed to identify any Supreme Court precedent that would compel such a finding. Petitioner has invoked *Morrissey v. Brewer*, 408 U.S. 471 (1972), in which the Supreme Court

held that parolees have a due process interest before having their parole revoked, and *Greenholtz v. Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), in which the Court determined that prisoners seeking parole have a liberty interest only where the state parole statute has specific standards giving rise to a legitimate expectation of release. For the reasons stated in detail below, the court cannot find, on federal habeas review, that the Appellate Division's decision confirming the Parole Board's June 7, 2001 determination involved an unreasonable application of these precedents, even if, on direct review, the court would be inclined to reach a different conclusion. Petitioner seeks to interpret those cases at a high level of generality to establish due process standards required in cases involving meaningful changes in parole status. Petitioner has failed to establish, however, in what way the Appellate Division's decision in his Article 78 appeal is contrary to or an unreasonable application of the rules established in either case.

As for petitioner's claim that the Board's rescission of his discharge from parole was without evidentiary basis, the court is again hard-pressed to find that petitioner raised this claim before the state court in federal constitutional terms. In his Appellate Division brief, petitioner relied on two New York state cases to support his argument that the Board had rescinded his discharge without "substantial evidence." Petitioner's Appellate Division Brief at 24-25. While both cases arguably employ federal constitutional analysis, neither do so in like fact situations. Both cases address the

procedures required for prisoners whose grant of parole was rescinded, invoking constitutional decisions of the Second Circuit. Even assuming that petitioner did present a federal constitutional claim to the state court, properly exhausting the claim for purposes of federal habeas review, the court notes again that the Appellate Division, in confirming the Parole Board's determination, dismissed the proceeding on the merits. Petitioner has not established that the state court's ruling involved an unreasonable application of clearly established Supreme Court precedent. Petitioner has not, and cannot, identify any Supreme Court precedent requiring respondent to present a particular quantum of evidence before a parole-related benefit may be rescinded. Because the Appellate Division decided petitioner's claim on the merits, and because petitioner cannot persuasively argue that the decision was contrary to or involved an unreasonable interpretation of Supreme Court precedent, the court may not grant habeas relief on this claim.

B. Liberty Interest

The thrust of petitioner's due process claim, and of his entire petition, is that once the Parole Board granted him a discharge from parole, he developed a liberty interest in that discharge entitling him to due process before it could be rescinded. Petitioner must emphasize that the discharge itself created such an interest because it is well-established that the New York statutes and regulations grant broad discretion to the Parole Board concerning discharges, giving parolees no

liberty interest in a discharge that has yet to be granted. *See Carmona v. Ward*, 439 U.S. 1091, 1098 (1979). There is no question that petitioner presented this claim in federal constitutional terms to the state court, and respondent concedes that the claim is properly exhausted. Petitioner's claim raises two intertwined issues, however, that lead the court to find that the claim is not appropriately presented in the habeas context.[1] The first issue is whether, in fact, petitioner had a liberty interest in the discharge, and second, if so, what remedy would be appropriate.

As noted, New York law does not create in any prisoner a legitimate expectancy of release on parole and thus confers no liberty interest on parole applicants. *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001). Similarly, New York law does not create in any parolee a legitimate expectancy of discharge from parole and thus confers no liberty interest in early discharge. *Smiley v. Westby*, No. 87 Civ. 6047 (LAP), 1994 WL 519973, at *5-6 (S.D.N.Y. Sept. 22, 1994). These cases interpreted the Supreme Court's decision in *Greenholtz* and determined that the New

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[1] The court notes that, in his petition, petitioner stated that he was seeking habeas relief or, in the alternative, "relief under 42 U.S.C. § 1983." Petitioner's brief in support of his petition, which was submitted by counsel, does not invoke section 1983. Thus, the court does not treat his filings in this case to present a claim under section 1983. Petitioner is represented by counsel, and he is free to commence an action under section 1983 if he so desires.

York parole scheme, unlike the Nebraska scheme analyzed by the Court in that case, created no legitimate expectation of a parole benefit. Notwithstanding the fact that the New York parole scheme does not entitle applicants for parole-benefits to any *Greenholtz* process, petitioner relies on *Greenholtz* to argue that he was deprived of a liberty interest. Petitioner also invokes in support of his claim the Supreme Court's decision in *Morrissey*, in which the Court found that parolees are entitled to certain process before having their parole revoked for violation of the conditions of their release. Petitioner claims that these cases constitute clearly established federal law making clear that a petitioner in his position, whose discharge from parole was rescinded on the basis of a mistake in the original determination, has been deprived of a liberty interest. The court does not agree. While the Supreme Court may issue such a ruling in the future, it has not yet done so. The court cannot find that the Appellate Division's ruling involved an unreasonable application of either *Greenholtz* or *Morrissey*. *Morrissey* arguably involves a much more significant deprivation of liberty than presented in this case, and, as noted, *Greenholtz* arguably has little, if any, relevance to petitioner's claim both because the New York statute does not fall within its ambit and because *Greenholtz* explicitly covers only the due process rights of parole applicants.

It is not clear what remedy would be appropriate were petitioner determined to have a liberty interest in the discharge. Neither petitioner nor respondent sheds any light on this issue. In light

of the fact that petitioner pursued his case via an Article 78 proceeding and has received subsequent determinations from the Parole Board regarding his request for absolute discharge, the court conceives that the only possible remedy on habeas review would be to order a new hearing by the Parole Board. The Appellate Division denied petitioner that relief, however, on the merits. Because petitioner has not shown that the state court's decision was contrary to or involved an unreasonable application of Supreme Court precedent, habeas relief is not warranted on this claim.

V. Lack of Authority to Rescind the Discharge

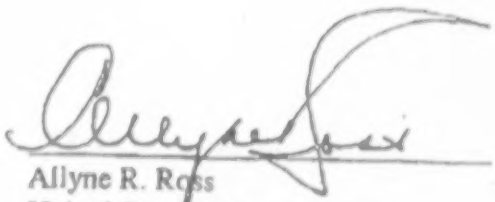
In his petition, petitioner claims that the Parole Board lacked authority to rescind his discharge. Petitioner did not pursue this claim in his brief, and, as a result, the court need not belabor the issue. Petitioner argued to the Appellate Division that "[t]he grounds upon which Petitioner's discharge was rescinded and later denied are outside the scope" of the governing state regulations. Petitioners' Appellate Division Brief at 20. This claim was presented to the state court as a claim grounded in state law, and, to the extent petitioner has presented the claim for federal habeas review, he only reiterates the state law claim. Thus, petitioner's claim is not cognizable on federal habeas review.

CONCLUSION

For the foregoing reasons, the court denies the instant petition for a writ of habeas corpus. No certificate of appealability is granted with respect to any of the petitioner's claims, since the petitioner failed to make a substantial showing of any denial of his constitutional rights. The petitioner has a right to seek a certificate of appealability from the United States Court of Appeals for the Second Circuit. 28 U.S.C. § 2253.

The Clerk of the Court is directed to enter judgment accordingly.

SO ORDERED.



Allyne R. Ross
United States District Judge.

Dated: March 21, 2005
Brooklyn, New York

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King v. New York State Div. of Parole
N.Y. 2003.

(The Decision of the Court of Appeals of New York is referenced in the North Eastern Reporter and New York Supplement in a table entitled "Motions for Leave to Appeal Granted or Denied.")

Court of Appeals of New York

In Matter of Darryl King

v.

New York State Division of Parole

NOS. 2-13, 892

November 25, 2003

2d Dept.: 306 A.D.2d 482, 761 N.Y.S.2d 515

Denied.

N.Y. 2003.
King v. New York State Div. of Parole
1 N.Y.3d 502, 807 N.E.2d 289, 775 N.Y.S.2d 239 (Table)

King v. New York State Div. of Parole
N.Y.A.D. 2 Dept. 2003.

Supreme Court, Appellate Division,
Second Department, New York.

In the Matter of Darryl KING,

Respondent,

v.

NEW YORK STATE DIVISION OF PAROLE, et al.,
Appellants.

June 23, 2003.

Eliot Spitzer, Attorney-General, New York, N.Y. (Michael S. Belohlavek and David Axinn of counsel), for appellants.
Beldock Levine & Hoffman, LLP, New York, N.Y. (Myron Beldock and Vera M. Scanlon of counsel), for respondent.

In a proceeding pursuant to CPLR article 78 to review a determination of the New York State Board of Parole dated June 7, 2001, denying the petitioner a discharge from parole, the New York State Division of Parole and Brion D. Travis appeal from an order of the Supreme Court, Kings County (Knipel, J.), dated May 24, 2002, which vacated the determination and directed the New York State Division of Parole to reconsider an application for discharge within 30 days.

ORDERED that on the court's own motion, the appellants' notice of appeal is treated as an application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is reversed, on the law, without costs or disbursements, the petition is denied, the determination is confirmed, and the proceeding is dismissed on the merits.

The discretionary determination of the New York State Division of Parole to deny the petitioner a discharge from parole was made in accordance with the law and, therefore, is not subject to judicial review (*see Matter of Gallo v. Travis*, 245 A.D.2d 448, 666 N.Y.S.2d 478; *see also People ex rel. Lord Organic Allah v. New York State Bd. of Parole*, 158 A.D.2d 328, 329, 551 N.Y.S.2d 16; *cf. Matter of Romer v. Travis*, 229 A.D.2d 553, 750 N.Y.S.2d 519, *lv. denied* 99 N.Y.2d 508, 757 N.Y.S.2d 818, 787 N.E.2d 1164; *Matter of Almeyda v. New York State Div. of Parole*, 290 A.D.2d 505, 736 N.Y.S.2d 275; *Matter of Thomas v. New York State Div. of Parole*, 286 A.D.2d 393, 394, 729 N.Y.S.2d 160; *Matter of Silmon v. Travis*, 266 A.D.2d 296, 698 N.Y.S.2d 685).

FEUERSTEIN, J.P., SCHMIDT, MASTRO and RIVERA, JJ., concur. N.Y.A.D. 2 Dept. 2003.
King v. New York State Div of Parole
306 A.D.2d 482, 761 N.Y.S.2d 515, 2003 N.Y. Slip Op. 15550

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

In the Matter of the Application of

Darryl King,

Petitioner,

-against-

New York State Division of Parole, and Brion D. Travis, Chair

Respondents.

DECISION

By Lawrence Knipel, J.S.C.

Dated: May 24, 2002
Index No.: 46218/01

This is a proceeding, *inter alia*, pursuant to CPLR article 78 to review a determination of the respondent New York State Division of Parole dated June 13, 2001, of which the petitioner was informed by letter dated July 26, 2001, denying the reapplication submitted by the local office of the Division of Parole to discharge the petitioner from parole.

In 1971, the petitioner was convicted, after a jury trial, of felony murder, manslaughter in the second degree, attempted robbery in the first degree,

assault in the first degree, and possession of a dangerous weapon, after an aborted holdup of a fast food restaurant in Brooklyn in which an off-duty police officer was killed. In 1987, after the United States Court of Appeals for the Second Circuit found the petitioner's sentence to be invalid, the petitioner was resentenced to 20 years to life, thus becoming eligible for parole release on May 28, 1990. The denial of the petitioner's initial request for parole was vacated since a member of the panel served on the original and the appeals panel. Additional hearings were held in October 1991 and on February 14, 1992, resulting in denials.

The petitioner challenged the latter denial in a proceeding pursuant to CPLR article 78, which was granted by the Supreme Court, New York County (Wright, J.), in January 1993. The court noted that despite the petitioner's "excellent reputation and accomplishments" parole release was denied due to the serious nature of the offenses "in which a young off-duty policeman was shot and killed during a restaurant robbery" and discretionary release would "deprecate the severity of this brutal crime." The court stated that without diminishing the irreparable circumstances of a loss of life, here "severity" appears to rest upon the conclusion that a 23 year old off duty probationary policeman was killed. The parole board was, in effect, stating that because a police officer was killed, parole would never be granted notwithstanding the applicant's remarkable accomplishments. Making the petitioner re-apply after 24 months would be meaningless since no consideration was given to his

rehabilitation and the severity of the crime would be unaltered. The court concluded that "It is difficult to imagine a case that cries out for parole louder than this one" and directed the parole board to grant parole.

The Appellate Division, First Department, modified (*Matter of King v. New York State Division of Parole*, 190 AD2d 423). The Appellate Division noted that at resentencing, defense counsel claimed ballistics evidence demonstrated that the petitioner could not have been the shooter and pointed out that the District Attorney's brief to the Second Circuit conceded that the petitioner had not fired the shot (190 AD2d at 425). The court concluded that the determination to deny petitioner's application for parole release must be set aside because "the decision of the Board was fatally tainted by its abdication of its responsibility to fairly consider all relevant factors." While the Appellate Division found "it difficult to believe that petitioner would be denied parole after a hearing at which the statutory factors are fairly and properly applied, the Parole Board should have the opportunity to make the determination using the appropriate standard," and remitted the matter to the Board to hold a de novo hearing before a different panel. The Appellate Division noted that the petitioner's submissions before the Board "establish that petitioner's record while in prison has been exemplary," that it was the Board's duty "to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and that "there is strong indication

that the denial of the petitioner's application was a foregone conclusion."

The Court of Appeals affirmed (83 NY2d 788), stating that the Board must "consider certain guidelines, including the inmate's institutional record, participation in a temporary release program, and release plans" and that while it need not expressly discuss each guideline, "it must provide the inmate with a proper hearing in which only the relevant guidelines are considered." The petitioner was placed on work release in 1993 and was granted parole on July 6, 1995. The petitioner now seeks an absolute discharge from parole. According to Execute Law § 259-j, "if the board of parole is satisfied that an absolute discharge from parole or from conditional release is in the best interests of society, the board may grant such a discharge prior to the expiration of the full term or maximum term to any person who has been on unrevoked parole or conditional release for at least three consecutive years." By Memorandum dated August 25, 2000, the Parole Board granted an absolute discharge to the petitioner.

By letter dated September 18, 2000, a senior parole officer informed the petitioner "it has been necessary for the Board of Parole to withdraw it's [sic] authorization for your early discharge" based on "the Board's finding errors and omissions in the discharge summary." The letter stated that a current mental status report has to be submitted to the Board, and that once such a report was completed, the matter would be resubmitted for consideration.

In a memorandum dated January 2, 2001 to the Parole Board, the "errors" were described as follows: (1) The discharge summary credited the petitioner with 84 months of parole supervision, mistakenly including 24 months of work release which should not have been included as parole time. The corrected report indicated 66 months of parole supervision measured form the parole release date of July 6, 1995; and (2) A mental health evaluation was required (the petitioner states he was told by his parole officer that a new mental health report was not necessary since the one obtained when he was found eligible for parole release was thorough and positive).

The petitioner was evaluated by a psychiatrist on November 20, 2000. The psychiatrist wrote that the petitioner "demonstrated no psychiatric symptoms. There are no psychiatric diagnoses. He is not in need of psychiatric therapy." The evaluator saw "no reason why, from a psychiatric perspective his parole should not be terminated. In short, I recommend termination of parole."

According to the petition, the Brooklyn Division of Parole resubmitted a request for absolute discharge from parole. By letter dated July 26, 2001, the Executive Director of the Division of Parole informed the petitioner that his request was deferred and may be resubmitted January 2, 2003. Accompanying that letter was a memorandum of the Division of Parole stating that "Subject's discharge is denied due to the extremely violent nature of the

instant offense, during the course of which a human life was taken (off duty NYC police officer). To release the subject from supervision at this juncture would depreciate [sic] the seriousness of his criminal act. His positive adjustment is noted however a longer period of supervision is necessary."

The petitioner argues that the denial of his request for discharge was unlawful, arbitrary and capricious, *inter alia*, in that he was denied a hearing and because the reasons given by the Parole Board for denying the discharge were beyond the scope of Executive Law § 259-j, bore no relationship to the reasons given in the September 18, 2000 letter rescinding the August 25, 2000 order of discharge, and were in violation of its own regulations.

In their answer, the respondents contend that to the extent petitioner is challenging the September 15, 2000 rescission of the final discharge from parole, he is time-barred since this proceeding is commenced more than four months after that determination. As for the revocation of his discharge from parole, the respondents contend that the petitioner has no right to a discharge and the discretion of the Division of Parole is not subject to judicial review. According to the respondents, the fact that the discharge summary was corrected to show 66 instead of 84 months "is sufficient to support the Commissioner's determination that a discharge at this time is not warranted time (sic) and that a longer period of supervision is necessary."

The petitioner, in reply, argues that the September 2000 revocation of the absolute discharge is not being challenged as an isolated event but as part of the timely petition challenging the denial of the local parole board's reapplication for the petitioner's discharge. Further, the petitioner and counsel were led to believe that absolute discharge was being withdrawn only due to miscalculations in the discharge summary and for a mental status evaluation, that the matter was subject to continuing consideration, and that therefore was no final determination. In any event, the petitioner contends, once he was granted absolute discharge in August 2000, he had a liberty interest which could not be rescinded without due process protections. Further, the petitioner argued, in light of the fact the he served 22 years in prison and spent seven years of unrevoked and unblemished work-release and parole supervision time, during which he achieved recognition for his service to the community, the refusal of the Parole Board to discharge him–for reasons having nothing to do with those stated in its revocation–arbitrary and capricious.

As noted above, Executive Law § 259-j provides that "if the board of parole is satisfied that an absolute discharge from parole * * * is in the best interests of society, the board may grant such a discharge prior to the expiration of the full term or maximum term to any person who has been on unrevoked parole or conditional release for at least three consecutive years." Plainly, the determination whether or not to grant an absolute discharge from

parole is discretionary. It is plain as well that, at least in the context of determining whether to grant parole release, that if the determination is made in accordance with statutory factors, the Parole Board's determination will be upheld absent a showing of irrationality (*see, e.g., Matter of Martinez v. Travis*, 734 NYS2d 507; *Matter of Thomas v. New York State Division of Parole*, 286 AD2d 393). In the unique circumstances presented here, including the failure of the Board to apply the proper statutory guidelines in reaching its determination, and the past history of this case, it is apparent that the respondents acted irrationally and their determination cannot be upheld.

In August 2000, the Parole Board granted the petitioner an absolute discharge from parole. The statutory standard for determining whether to grant a discharge from parole is whether the Parole Board is satisfied that an absolute discharge is in the best interests of society. In September 2000, according to the January 2, 2001 memorandum, "that action had to be withdrawn due to errors on the initial submission," namely, the failure to include a mental status evaluation and a miscalculation of the months or parole supervision. The deficiency of the mental status evaluation was rectified in November 2000, when the petitioner was evaluated by a psychiatrist who saw "no reason why, from a psychiatric perspective his parole should not be determined" and recommended that his parole be terminated.

One wonders how the other reason, the mistaken inclusion of 24 months of work release into

the reported 84 months of parole supervision, is rationally related to the best interests of society. The statute calls for a 36 month minimum period before a parolee is eligible and the petitioner had over 60 months of unrevoked parole release. After 22 years in prison, 24 months of work release, over 60 months of unrevoked parole release, having contributed to the community, one wonders how it is any less in the best interests of society to release the petitioner than if he had 71 months (as he had when the Parole Board denied the reapplication for discharge in June 2001), or the more than 89 months the petitioner will have in January 2003 when the application may again be resubmitted. Whatever the answer to this question may be, it is apparent that the respondents' June 2001 determination denying the reapplication of the local parole board to discharge the petitioner from parole has no connection to the two reasons advanced in January 2001. Instead of indicating whether is was "satisfied that an absolute discharge from parole * * * is in the best interests of society," the Parole Board reiterated the same reasons it used to deny the petitioner parole release on multiple occasions–the "extremely violent nature of the instant offense during the course of which a human life was taken (off duty police officer)," and a pronouncement that the petitioner's release "would depreciate the seriousness of his criminal act." None of this was unknown in August 2000 when he was granted an absolute release, and none of this will change in January 2003 or whatever other date to which the Parole Board will defer the next reapplication. Since the Parole Board failed to apply the proper statutory standard, and denied discharge

for reasons having nothing to do with the reasons advanced why the August 2000 discharge was "withdrawn," the Parole Board's determination is irrational, arbitrary and capricious and must be vacated. The arbitrary and capricious nature of the Board's determination is reinforced by the extensive history of these proceedings.

Accordingly, the petition is granted to the extent that the determination denying the absolute discharge of petitioner from parole is vacated. The Parole Board will reconsider the reapplication within 30 days of the date of this decision and judgment, using the proper standard, and will inform the petitioner, his attorney, and the court of the result.

The foregoing constitutes the decision and judgment of this court.

ENTER:

Lawrence Knipel

LAWRENCE KNIPEL, J.S.C.